Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

KATHY STUPAK-THRALL; and MICHAEL A. GAJEWSKI, Major (Retired/Disability) United States Army, and BODIL GAJEWSKI, husband and wife,

Petitioners,

v.

UNITED STATES OF AMERICA and DANIEL R. GLICKMAN, Secretary Of Agriculture, Individually And In His Official Capacity,

Respondents.

On Petition For *Writ Of Certiorari*
To The United States Court Of Appeals
For The Sixth Circuit

REPLY TO OPPOSITION

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REASONS FOR GRANTING THE WRIT

I. RESPONDENTS' ASSERTION THAT "NONE OF THE OPINIONS ISSUED IN THIS CASE WILL HAVE BINDING EFFECT EVEN WITHIN THE SIXTH CIRCUIT" IGNORES THE FACT THAT RESPONDENTS CONTINUE TO APPLY AN INTERPRETATION OF THE PROPERTY CLAUSE THAT IS CONTRARY TO THE CONSTITUTION AND THE HOLDINGS OF THIS COURT.[1]

Respondents have subjected Petitioners, Stupak-Thrall and the Gajewskis, to years of litigation by the application of a view of the Property Clause that has never been sanctioned by this Court. Despite the absence of any authority for the position they have taken, Respondents continue to apply their view of the Property Clause in a manner contrary to the interests of land owners and local and state governments.[2] The numerous *amici* briefs filed in this case demonstrate the importance of the questions presented for review by Stupak-Thrall and the Gajewskis.[3]

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[1] Opposition at 12.

[2] Respondents will no doubt continue to cite to the district court's opinion as authority for similar actions elsewhere.

[3] Four *amici* briefs have been filed in this case in support of Petitioners: Brief of Governor John Engler of the State of Michigan (hereinafter referred to as "*Amicus* Engler"); Brief of States of Colorado, Alaska, California and South Dakota (hereinafter referred to as "*Amici* States"); Brief of the Honorable Peter Hoekstra – Member of Congress, *et al.*, (hereinafter referred to as "*Amici* Hoekstra"); and Brief of Arizona State Chamber of Commerce, Lake States Resources Alliance, Inc., the National Federation of Independent Businesses Legal Foundation, The National Mining Association, and the Independent Petroleum Association of America (hereinafter referred to as "*Amici* Arizona Chamber").

Resolution of these issues is vitally important to prevent Respondents from continuing to apply a theory of the Constitution for which there is no support.

II. RESPONDENTS' ASSERTION THAT THEIR APPLICATION OF AN ERRONEOUS VIEW OF THE PROPERTY CLAUSE DOES NOT RAISE "AN ISSUE OF BROAD OR RECURRING IMPORTANCE," SINCE ONLY THE STATE OF MICHIGAN IS AFFECTED, IS IN ERROR.[4]

The phrase "valid existing rights" is contained in nearly every federal land management statute and is certainly contained in every wilderness act, as made clear by the brief filed by *Amicus* Engler. As a result, Respondents' erroneous view of the Property Clause will have an affect throughout the country. The view of Respondents that the Property Clause gives the United States Forest Service (USFS) the ability to control private property as a result of its proximity to federal lands will affect millions of acres of private property and hundreds of millions of dollars of economic activity occurring on federal lands, as the briefs of *Amici* States, *Amici* Arizona Chapter, and *Amici* Hoekstra make clear.

III. THERE IS NO AUTHORITY FOR RESPONDENTS' CLAIM TO THE POLICE POWER POSSESSED BY STATE OR LOCAL GOVERNMENTS REGARDING PRIVATE PROPERTY.

There is no authority for Respondents' claim that the USFS has the same police powers possessed by state or local governments regarding private property. Respondents cite *Kleppe v. New Mexico*, 426 U.S. 529 (1976) for the proposition that a police power exists in Congress, but if that power exists it exists only with regard to land owned

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[4] Opposition at 9-10.

by the United States.[5] *Id.* at 540. What authority Congress possesses under the Property Clause regarding the regulation of private property is an open question: "We . . . leave open the question of the permissible reach of the Act over *private lands* under the Property Clause." *Kleppe*, at 547. (Emphasis added.) *See Amici* Hoekstra at 11, 13.

IV. RESPONDENTS ATTEMPT TO STAND IN THE SHOES OF STATE AND LOCAL GOVERNMENTS MUST FAIL SINCE NO AUTHORITY EXISTS FOR SUCH A VIEW.

Respondents take the position that they may regulate the "valid existing rights" of Stupak-Thrall and the Gajewskis into "meaninglessness," despite the fact that "those activities have not previously been restricted in

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[5] Respondents' reliance on *Kleppe* as a source of Respondents' expansive view of their power under the Property Clause is badly misplaced. Respondents admit that both cases upon which they rely (*United States v. Alford*, 274 U.S. 264 (1927) and *Camfield v. United States*, 167 U.S. 518 (1897)) do not concern the Property Clause, thus they must depend on *Kleppe*. Respondents acknowledge that *Kleppe* says only that Congress' power may "reach beyond territorial limits." Yet Respondents failed to acknowledge that *Kleppe* expressly declines to express what power, if any, the Property Clause give Congress over private property. That is the reason why this petition should be granted.

Moreover, expanding the dicta of *Kleppe* to give Congress general police power over private property and then transferring that authority through the MWA to the USFS, in the absence of an express delegation by Congress, creates a constitutional conflict. Courts must avoid, if possible, a construction of a statute that raises constitutional problems. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988). *See* also *Amici* States at 6.

the manner at issue here." (Opposition at 11.) Respondents thus wish to have it both ways. That is, Respondents want to stand in the shoes of state and local governments in the State of Michigan with regard to the regulation of private property, but do not wish to be constrained by the manner in which those governments have defined property rights. The fact is that those activities "have not previously been restricted" by state and local governments in Michigan because those activities are "valid existing rights" in Michigan. As Governor Engler declares:

> Whether the State of Michigan could have extinguished its citizens' riparian rights without paying compensation is not at all clear on this record. Even if the state possessed such power, however, it has not agreed to share or cede that sovereign power to the Forest Service.

(*Amicus* Engler at 13.)

Contrary to Respondents' assertion, Stupak-Thrall and the Gajewskis have made clear their basis for objecting to the analysis by the courts below. The very activities that Respondents have regulated out of existence are activities that are "valid existing rights" in Michigan and therefore protected by the "valid existing rights" language of the MWA.[6]

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[6] Respondents' statement that the phrase "valid existing rights" does not mean the same thing when used in numerous federal land statutes is absurd. While a particular state's definition of what is a "valid existing right" within that state may vary, the use by Congress of a given phrase in federal land statutes must be accorded the same meaning or else federal law is subject to the whim and caprice of federal agencies.

V. DESPITE RESPONDENTS' ASSERTION, IT WAS THE USFS, NOT CONGRESS, THAT ISSUED AMENDMENT 1, AN AMENDMENT THAT WAS ISSUED WITH REGARD TO PROPERTY THAT IS NOT OWNED IN ITS ENTIRETY BY THE FEDERAL GOVERNMENT.

Respondents seek to confuse this Court by asserting that "Congress undoubtedly has the constitutional power under the Property Clause to issue Amendment No. 1." (Opposition at p. 14.) Yet Congress did not issue Amendment No. 1, the USFS did. What Congress did do was to instruct the USFS that in adopting any regulations to manage the Sylvania Wilderness Area it had to do so consistent with "valid existing rights." (§ 5 of the MWA.)

While Congress has power to regulate federal property under the Property Clause, it cannot regulate private property, not if it wishes to remain consistent with the holding of this Court in *Kleppe*. And the USFS may not regulate private property in light of the requirement of Congress that "valid existing rights" be protected. Respondents admit that they do not own all of the sticks in the bundle that is the surface of Crooked Lake, yet they assert that they have the power under the Property Clause to regulate it as if they did, despite the limits imposed by the Constitution on Congress and the limits imposed by Congress on the USFS.[7]

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[7] Respondents' assertion, at page 14 of their Opposition, that Congress intended to regulate, as wilderness, the surface of Crooked Lake is absurd. One thing on the subject is clear: Congress intended to protect "valid existing rights," including the private property rights not owned by the USFS in the surface of Crooked Lake. If the USFS may regulate the surface of Crooked Lake, which it does not own in its entirety, as a wilderness, then the "valid existing rights" language adopted by Congress is rendered meaningless. "The panel's interpretation of the phrase 'valid existing rights' renders that term completely meaningless." (*Stupak-Thrall v. United States*, 89

VI. THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WESTERN MICHIGAN, AFFIRMED BY AN EQUALLY DIVIDED UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, IS A SIGNIFICANT EXPANSION OF FEDERAL POWER CONTRARY TO THE CONSTITUTION AND THE HOLDINGS OF THIS COURT.

A. The Decisions Below Are A Significant Expansion Of Federal Power Contrary To The Holdings Of This Court.

The decision of the District Court upheld "the Forest Service's regulations extinguishing petitioners' property rights in this case, based upon its view that Forest Service possessed some type of 'police power' under the Property Clause, that included the police power of the State of Michigan." (*Amici* States at 2.) Respondents argue that the District Court's decision was correct since under the Property Clause the USFS has the same police power as any state or local government. (Opposition at 11.) This is in error.

As this Court has held:

> The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation. *See* U.S. Const., Art. I, Sec. 8.

United States v. Lopez, 514 U.S. ___, 115 S.Ct. 1624, 1633 (1995). In other words, Congress does not have a general police power comparable to the police power of state or local governments. A general police power could have been included in the enumerated powers of Congress under Article I, Section 8 of the Constitution, but it was not.

The Property Clause may give Congress "police power" over "Property belonging to the United States" in

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F.3d 1269, 1292-1293 (6th Cir. 1996) (J. Boggs, dissenting)). (App. 63.) This a court cannot do.

accordance with *Kleppe*, 426 U.S. at 540, and the provisions of Article IV, Section 3 to "make all needful Rules and Regulations." But that power is limited to "Property belonging to the United States." The surface of Crooked Lake does not "belong[ ] to the United States," but is private property owned in common by all of its riparians, including Kathy Stupak-Thrall and the Gajewskis, and riparian rights are defined, not by Congress or the USFS, but by the State of Michigan. Furthermore, it is the State of Michigan that holds general police power over private property within the State of Michigan. While the State of Michigan may cede its police power to the United States, that has not happened in this case. *See Amicus* Engler at 13.

Additionally, the Property Clause gives authority to Congress, not the Executive Branch and its agency, the USFS. Congress expressly declined to convey its Property Clause authority to the USFS in this case. In passing the Michigan Wilderness Act (MWA), Public Law 100-184, 101 Stat. 1274, Congress protected property rights recognized by the State of Michigan by including the phrase "valid existing rights" in § 5 of the MWA. (App. 159.)

Even if Congress had not specifically protected property rights, any attempt to interpret a federal statute as upsetting the "usual constitutional balance of federal and state powers" would have to be expressly stated by Congress:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' *it must make its intention to do so 'unmistakably clear in the language of the statute.'* . . . Congress should make its intention *'clear and manifest' if it intends to pre-empt the historic powers of the States. . . .* "
>
> This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which *Congress does not readily interfere.*

Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991). (Citations omitted and emphasis added.) The general police powers of the states are part of each state's "substantial sovereign powers" and are "historic powers of the states." *Id.* Congress not only failed to "alter" that balance in "unmistakably clear" language in this case, it went out of its way to protect "valid existing rights" established by state law. *See, e.g., Amicus* Engler at 11.

B. The Decisions Below Are A Significant Expansion Of Federal Power Contrary To The Tenth Amendment To the United States Constitution.

This Court has held that the Tenth Amendment provides for "a healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front. . . . " *Ashcroft*, 501 U.S. at 459. If the peoples' rights "are invaded by either, [the people] can make use of the other as the instrument of redress," since "[i]n the tension between federal and state power lies the promise of liberty." *Ashcroft*, 501 U.S. at 459-60.

If the USFS is allowed to stand in the shoes of state and local governments, exercising the police powers reserved by the Tenth Amendment to state and local governments, the Tenth Amendment has become a nullity. Under the District Court's ruling and Respondents' arguments, the United States not only has all of the powers enumerated in the Constitution, but has the powers reserved to the states as well.[8] This is clearly contrary to the Tenth Amendment.

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[8] "Congress' authority is limited to those powers enumerated in the Constitution" and "those enumerated powers . . . hav[e] judicially enforceable outer limits." *Lopez*, 115 S.Ct. at 1633.

VII. THE DECISION OF THE SIXTH CIRCUIT, THAT THE USFS HAS AUTHORITY TO REGULATE PETITIONERS' RIPARIAN PROPERTY RIGHTS, IS IN TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH THE HOLDINGS OF THIS COURT REGARDING THE MANNER IN WHICH STATUTES ARE TO BE INTERPRETED.

An "elementary canon of construction [is] that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 684 (1979). The holding of the Sixth Circuit regarding "subject to valid existing rights" renders that phrase "inoperative" or meaningless and in conflict with this Court's holding in *Great Northern Railway Company v. Steinke*, 261 U.S. 119 (1923).[9] This the Sixth Circuit may not do.

Respondents argue that the only purpose of the phrase "subject to valid existing rights" is to ensure that the regulations "do not effect a taking of private property. . . . " (Opposition at 15.) Moreover, Respondents assert that the USFS may therefore, regulate the property rights of Stupak-Thrall and the Gajewskis up to the point where an unconstitutional taking would occur. This is absurd for the reasons set forth by Judge Boggs in his dissent found at App. 66-72. *Stupak-Thrall II*, 89 F.3d at 1294-96 (J. Boggs, dissenting).

VIII. THE IMPORTANCE OF THE QUESTIONS PRESENTED FOR REVIEW IN THIS CASE IS DEMONSTRATED BY THE *AMICI* THAT HAVE FILED IN SUPPORT OF PETITIONERS.

A review of the states, local governments, grass-roots groups, and economic interests that have joined in requesting that this Court grant this Petition demonstrates the importance of the questions presented for review. The states that joined in this Petition are Alaska,

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[9] (Petition at 7-8.)

California, Colorado, South Dakota, and Michigan, which together contain over 324 million acres of federally-owned lands, nearly 50% of all federally-owned lands in the United States.[10]

The other two *Amici* briefs represent over 50 local governments, other groups and individuals, including the township where Crooked Lake is located, Watersmeet Township Board; and various national trade associations, whose inability to use private property near federal land and to protect "valid existing rights" on federal lands will affect adversely economic and recreational interests. *See, for example,* pages 15-16 of *Amici* Arizona Chamber.

CONCLUSION

For all of the above reasons, this Court should grant the petition in this matter.

Respectfully submitted,

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[10] "Public Land Statistics" – 1992 Edition, published by the U.S. Department of Interior, Bureau of Land Management, p. 5.